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Intentional Interference with Visitation Rights: Is This a Tort? Owens v. Owens

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NOTE

INTENTIONAL INTERFERENCE WITH VISITATION RIGHTS: IS THIS A TORT?: OWENS V. OWENS

In 1985, a Louisiana court addressed for the first time the question of whether the intentional interference with the visitation rights of a noncustodial parent can give rise to a civil cause of action in tort for damages. The Louisiana Second Circuit Court of Appeal answered this question negatively, when the noncustodial parent of a two year old child filed suit against the custodial parent seeking damages for willful interference with court ordered visitation rights.[1]

The Owens were married and had one daughter. When their daughter was one year old, the Owens were judicially separated, and the court awarded sole custody to the mother. Mr. Owens was granted specific visitation rights which allowed him access to his daughter one weekend a month, alternating holidays, Father's Day, and two weeks each summer. Nevertheless, Mrs. Owens consistently prevented her husband from seeing his daughter, with the result that he was unable to exercise his visitation rights, with one exception, for nearly a year after the separation. The exception occurred when Mrs. Owens was jailed for contempt for not delivering her daughter to him. After several unsuccessful attempts to see his child subsequent to his wife's jailing, Mr. Owens brought suit against his wife for damages for intentional interference with his visitation rights.[2]

The trial court rejected the plaintiff-father's demands and held that no cause of action exists in Louisiana for the "tort" of interference with visitation rights, as no statute authorizes such an action. The second circuit affirmed, relying on a decision by the Louisiana Supreme Court for the proposition that, in the absence of statutory authority, no cause of action exists for damages for the loss of services, support, companionship or affections of a human being.[3] The court also distinguished recognition in the Louisiana jurisprudence of an action in tort brought

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1. Owens v. Owens, 471 So. 2d 920 (La. App. 2d Cir. 1985), cert. denied, 475 So. 2d 362 (La. 1985).
2. Id. at 920-21.
3. Moulin v. Monteleone, 165 La. 169, 115 So. 447 (1927).

by a custodial parent against a noncustodial parent for damages resulting from interference with *custodial* rights.[4] In conclusion, the court noted that denying the plaintiff an action for damages did not leave him entirely without a remedy, as reflected by plaintiff's simultaneous institution of proceedings to enforce his visitation rights,[5] to have the defendant placed in contempt[6] and to obtain custody.[7]

In light of the steady rise in the divorce rate in the United States and of the resulting increase in the occurrence of child custody disputes,[8] it is unfortunate that the court in *Owens* failed to state any policy reasons for denying the cause of action, and that it failed to suggest an alternative to which aggrieved parents could confidently turn for protection of their rights. Additionally, the decision seems inconsistent with recent legislative changes in regard to child custody and visitation which reflect a strong public interest in allowing both parents to have a continuing relationship with their children after separation and divorce.[9]

This case note questions the effectiveness of Louisiana's current mechanisms for enforcing visitation rights and explores the interests at stake in post divorce disputes generally. It also examines the feasibility of allowing a civil suit in damages for interference with visitation rights in light of current Louisiana policy, and suggests alternative courses of action.

Louisiana Law and Policy Towards The Parent/Child Relationship After Separation and Divorce

Louisiana Civil Code articles 146 and 157 provide the statutory scheme which governs the issues engendered by a child custody dispute. Legislative changes to that scheme in recent years have replaced the "maternal preference" rule with a rebuttable presumption that *joint custody* is in the best interest of the minor child.[10] Louisiana courts

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4. Spencer v. Terebelo, 373 So. 2d 200 (La. App. 4th Cir. 1979).

5. La. R.S. 9:305 (Supp. 1985) states in part: "When the court renders judgement in an action to . . . enforce child visitation rights, except for good cause, the court shall award attorney fees and costs to the prevailing party."

6. La. R.S. 13:4611(1)(d) (Supp. 1985).

7. 471 So. 2d at 922 (La. App. 2d Cir. 1985). After the Louisiana Supreme Court denied writs, 475 So. 2d 362, Mr. Owens successfully secured sole custody of his daughter.

8. United States Department of Commerce, Statistical Abstract of the United States 54, 82 (105th ed. 1985).

9. See discussion accompanying infra notes 10-18.

10. Under the maternal preference rule, custody was virtually always given solely to the mother. 1979 La. Acts No. 718 initiated the shift of emphasis away from this rule, amending articles 146 and 157 to provide that custody be granted to the "husband or wife" and that no preference be "given on the basis of the sex of the parent." 1981 La. Acts No. 283 further amended these articles "to provide for joint custody" and "to

have held that "[t]his presumption is properly rebutted by a showing that a different arrangement is in the child's best interest."[11] With respect to the implementation of the joint custody presumption, the Civil Code requires that "[p]hysical care and custody . . . be shared by the parents in such a way as to assure a child of frequent and continuing contact with both parents."[12] Consistent with this requirement, the court in *Plemar v. Plemar*[13] interpreted joint custody as "a physical sharing of the child in addition to both parents participating in decisions affecting the child's life—e.g., education, medical problems, recreation, etc."[14]

Nevertheless, the physical sharing of the custody of the child which the Civil Code describes is limited to that which is "feasible."[15] Among the factors considered to determine the feasibility of joint custody are the "willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent."[16] This emphasis upon parental willingness and cooperation in allowing the other parent contact with the child is one manifestation of the policy underlying the entire new statutory scheme of facilitating and continuing the parent-child relationship. The legislature's complete about-face regarding joint custody[17] reflects a strong

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provide for natural cotutorship." Joint custody still was given no preference or presumption, but was only awarded "if both husband and wife agree to joint custody and the court deems it in the best interest of the children." 1982 La. Acts No. 307 established an order of preference for awarding custody, and for the first time created a rebuttable presumption in favor of joint custody. This presumption was rebuttable, however, if the parents chose sole custody, or if the court found that joint custody was not in the best interest of the child. 1983 La. Acts No. 695 amended article 146 to its present formulation of the rebuttable presumption. It is notable that the presumption can no longer be rebutted by the mere fact that the parents have chosen sole custody. La. Civ. Code art. 146 (c) (1) & (2). See also Bordelon v. Bordelon, 390 So. 2d 1325 (La. 1980).

11. Doyle v. Doyle, 465 So. 2d 167, 170 (La. App. 3d Cir. 1985). See also Turner v. Turner, 455 So. 2d 1374 (La. 1984).

12. La. Civ. Code art. 146 (D).

13. 436 So. 2d 1348 (La. App. 4th Cir. 1983).

14. Id. at 1350.

15. La. Civ. Code art. 146 (D). See also *Plemar*, in which the court did not interpret joint custody to mandate a fixed rule of "a fifty-fifty sharing of time," but noted instead that "[e]ach case will depend on the child's age, the parents' availability and desires, and other factors." 436 So. 2d at 1350.

16. La. Civ. Code art. 146 (D) states that the factors in (C) (2) will be applied. These are the same factors used in the initial determination of whether joint custody is in the best interests of the child.

17. The maternal preference rule was operative from 1825-1979, during which time any arrangement which even closely resembled divided custody was frowned upon. La. Civ. Code art. 146 (1825). See also Johnson v. Johnson, 214 La. 912, 39 So. 2d 340 (1949) ("[T]he welfare of a child . . . requires a custody and control under an undivided authority, and . . . visitation [by the noncustodial parent] should never in any case be extended to the point where it becomes divided custody or a division of such authority.").

belief that the child, and in turn the parents, would normally be best served by the child's continuous stable contact with both parents.[18]

Since the enactment of the new legislation, the Louisiana Supreme Court, consistent with United States Supreme Court precedent, has recognized the noncustodial parent's right of visitation as "a natural right . . . enforceable in a civil action when the custodial parent denies visitation access."[19] In the same decision, the court held that the father of an illegitimate child could not be denied visitation solely because the child was illegitimate.[20] The court found that a presumption existed in favor of visitation, relying in part on the view that visitation is "'important for a child's whole growth, mental, physical and spiritual,'" and that, as a result, denial of visitation could cause the child to feel rejected and confused.[21]

Louisiana law and policy as thus far described embodies the substance and spirit of current United States Supreme Court rulings. With regard to termination of parental rights, the Supreme Court has warned that, "a parent's desire for and right to the companionship, care, custody and management of his or her children is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"[22] Although when the Court made this statement it was addressing the issue of terminating parental rights, a parent of a child, legitimate or illegitimate, who is deprived of visitation arguably feels the same loss as a parent whose rights have been terminated.

Although the court in *Owens* recognized that the father had available certain remedies,[23] it failed to acknowledge that his attempts to gain access to his child through those remedies had repeatedly been futile. It is the fact of deterrence, more than merely that of compensation,

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18. See Maxwell v. LeBlanc, 434 So. 2d 375, 379 (La. 1983) wherein the court stated: "[T]he 'best interest' standard can only be correctly applied with a real cognizance of the widely accepted view that it is generally in the child's best interest to have continued contact with noncustodial parents." (citations omitted).

19. Maxwell v. LeBlanc, 434 So. 2d 375, 376 (La. 1983)(citing Roshto v. Roshto, 214 La. 922, 39 So. 2d 344 (1949); Johnson v. Johnson, 214 La. 912, 39 So. 2d 340 (1949); Pierce v. Pierce, 213 La. 475, 35 So. 2d 22 (1948); Jacquet v. Disimone, 175 La. 617, 143 So. 710 (1932)).

20. Id. at 380.

21. Id. at 379 (quoting Pierce v. Yerkovich, 80 Misc. 2d 613, 363 N.Y.S.2d 403, 410 (1974)).

22. Lassiter v. Department of Social Servs., 452 U.S. 18, 27, 101 S. Ct. 2153, 2159-60 (1981)(citing Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212 (1972)). See also May v. Anderson, 345 U.S. 528, 533, 73 S. Ct. 840, 843 (1953)(parental rights are "far more precious . . . than property rights"); In re Howard, 382 So. 2d 194, 198 (La. App. 2d Cir. 1980)(termination of parental rights is a "unique kind of deprivation").

23. The court stated: "He may institute proceedings to enforce his visitation rights . . . . He may institute contempt proceedings or he may institute proceedings to obtain custody of the child for himself." 471 So. 2d at 922.

which granting a cause of action in damages offers. In this case, the object of deterrence was limiting the already considerable length of time—an entire year—during which Mr. Owens was denied access to his daughter. It is clear that such an object serves the fundamental policy currently underlying Louisiana law of ensuring continuous contact between the noncustodial parent and the child. The question necessarily arises, however, whether a civil cause of action in tort is a desirable means to achieve this goal. Before directly answering that question, however, it is worthwhile comparing the action for interference with visitation privileges with a cause of action which Louisiana courts *have* recognized—i.e., the action for interfence with custody.

The Cause of Action for Interference With Custody: How Relevant is the Distinction?

In *Spencer v. Terebelo*,[24] the Louisiana Fourth Circuit Court of Appeal upheld a cause of action in tort brought by a custodial parent against the noncustodial parent for the intentional deprivation of *custody*. Other jurisdictions have also treated interference with full custody as an actionable tort.[25] The court in *Owens* distinguished *Spencer* on three grounds: first, because *Spencer* involved an action instituted by a custodial parent rather than a noncustodial parent; second, because in *Spencer* there had been a violation of a criminal statute; and finally, because *Spencer* did not deviate from the general rule set forth by the Louisiana Supreme Court in *Moulin v. Monteleone* regarding the need for a statutory basis for an action for damages for loss of companionship or affection of a human being.[26]

The distinction between a custodial and a noncustodial parent-plaintiff is an unconvincing basis upon which to deny recovery to a parent who is prevented from exercising his visitation rights. The Louisiana Supreme Court has referred to visitation as a "species" of custody, thus recognizing that the two are necessarily related.[27] Moreover, as noted above, a parent has certain natural rights which demand great deference and which exist independently of custody or noncustody. That a court has awarded custody to one parent does not give that parent the right to negate the rights of the noncustodial parent. In fact, the noncustodial parent is arguably in much greater need of protection, since

24. 373 So. 2d 200 (La. App. 4th Cir. 1979).

25. See, e.g., Ruffalo v. United States, 590 F. Supp. 706, 711 (W.D. Mo. 1984) (citing Kramer v. Leineweber, 642 S.W.2d 364 (Mo. App. 1982); Kipper v. Vokolek, 546 S.W.2d 521 (Mo. App. 1977); Wood v. Wood, 338 N.W.2d 123 (Iowa 1983); Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982)).

26. 471 So. 2d at 921.

27. Maxwell v. Leblanc, 434 So. 2d at 377.

the custodial parent is able to control when or if visitation will take place.[28] Consequently, just as the noncustodial parent owes a duty to the custodial parent not to interfere with custody,[29] the custodial parent should be held to owe an equal duty to the noncustodial parent not to interfere with the parent-child relationship which visitation is designed to protect.[30] The status of a plaintiff as a custodial or noncustodial parent, then, is only a matter of degree and should relate to the extent of damages rather than to liability.[31]

Furthermore, the emphasis by the court in *Owen* on the need for a statutory duty—i.e., the second basis of distinction from *Spencer*[32]—was misplaced. In light of the "natural right" to visitation described above, a legal duty not to interfere with court ordered visitation rights may exist independently of any statutory authority. Even so, there was ample statutory authority from which the court in *Owen* could have derived the duty it required. One example is Louisiana Revised Statutes 14:133.1,[33] which imposes upon every individual a legal duty to obey court orders. The visitation rights granted by the court at the separation proceedings prior to *Owens* imposed a legal duty upon the defendant to comply, and her failure to do so clearly amounted to a breach of that duty. In addition, article 146 implies a legal duty on the part of both parents to facilitate and encourage a close and continuing relationship between the child and the other parent. This duty may be

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28. In theory, or course, the custodial parent must abide by the visitation plan as mandated in the custody judgment. Nevertheless, in practice, he or she can dictate the terms under which visitation will occur.

29. Spencer v. Terebelo, 373 So. 2d 200.

30. This duty, as well as a similar duty to noncustodial parents owed by third persons, has been recognized in a number of jurisdictions. See, e.g., Sheltra v. Smith, 136 Vt. 472, 392 A.2d 431 (1978); Raftery v. Scott, 756 F.2d 335 (4th Cir. 1985); Ruffalo v. United States, 590 F. Supp. 706 (W.D. Mo. 1984); Pyle v. Pyle, 11 Ohio App. 3d 31, 463 N.E.2d 98 (1983); Knight v. Dixon, No. 123873 (Super. Ct. Wash. Oct. 21, 1975); Johannes V. Sloan, No. 79-L-169 (Kankakee County Cir. Ct. Ill. March 25, 1981); Memmer v. Memmer, No. 45503 (Fairfax County Cir. Ct. Va. 1979). See also A Comparative Analysis, 4 B.C. Inter'l and Comp. Law Rev. 283, 312 (1981), which discusses the availability of a cause of action for damages for interference with visitation rights under French Civil Code articles 247 (4) and 289.

31. Ruffalo v. United States, 590 F. Supp. 706, 711 (W.D. Mo. 1984).

32. 471 So. 2d at 921 (La. App. 2d Cir. 1985). The court in *Owens* noted that *Spencer* involved the violation of a criminal statute, La. R.S. 14:45 A (4), which establishes a legal duty in favor of the custodial parent.

33. La. R.S. 14:133.1 (Supp. 1986) provides:

> Whoever, by threats or force, or wilfully prevents, obstructs, impedes, or interferes with, or wilfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the state of Louisiana, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

derived from both the basic premise behind the joint custody statute, and from the statute itself.[34]

Finally, it may be argued that *Moulin v. Monteleone*,[35] on which the court in *Owens* relied for its final distinction of *Spencer*, has been statutorily overruled. The court in *Owen* cited *Moulin* for the proposition that absent a statute, there is no right of action for damages for loss of services, companionship or affection of a human being. Louisiana Civil Code article 2315 as amended by Act 202 of 1982, however, now allows a cause of action for loss of services, support and companionship.[36] The article is arguably broad enough in scope to provide relief for any injury formerly rendered unactionable by *Moulin*.

In the end, there seems to be no convincing reason for allowing a cause of action in favor of the custodial parent, but not in favor of the noncustodial parent. The question must still be asked, however, whether allowing these suits between ex-spouses is the best approach to this problem, and if not, what alternatives exist.

Support For a Civil Cause of Action For Intentional Interference With Visitation

A number of jurisdictions have upheld, under the theory of intentional infliction of mental distress, a cause of action brought by a noncustodial parent for interference with visitation rights,[37] and at least one court has recognized the tort of "interference with visitation" without resorting to the more commonly accepted "mental distress" theory.[38] Additionally, Restatement (Second) of Torts recognizes the tort of "outrageous conduct causing severe emotional distress,"[39] which may also provide a theory of recovery in this context.

The Supreme Court of Vermont, in *Sheltra v. Smith*,[40] found that a noncustodial mother had stated a cause of action when she brought suit based on the defendant's "'rendering it impossible for any personal contact or communication to take place between the Plaintiff and her daughter.'"[41] The court described the elements of the action as "outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in suffering of extreme

34. See La. Civ. Code art. 146 (C) (2) (j).

35. 165 La. 169, 115 So. 447 (1927).

36. 1982 La. Acts No. 202 (effective September 10, 1982).

37. See supra note 30.

38. The court in Ruffalo v. United States, 590 F. Supp. 706 (W.D. Mo. 1984), did not use the term "intentional infliction of emotional distress" as a theory for recovery, but rather based the cause of action on intentional interference with visitation rights.

39. Restatement (Second) of Torts § 46 (1963).

40. 136 Vt. 472, 392 A.2d 431 (1978).

41. Id. at 433.

emotional distress, actually or proximately caused by the outrageous conduct."[42] It was conceded in a later case that the plaintiff in *Sheltra* was the noncustodial parent[43] and that she was allowed to recover damages for this deprivation of visitation which lasted only one month.[44]

In a recent United States Court of Appeal case,[45] the fourth circuit upheld a jury award of $40,000 in compensatory damages and $10,000 in punitive damages for intentional infliction of emotional distress, when a custodial mother prevented the noncustodial father from exercising his visitation privileges. The court found that the father had stated a cause of action even though Virginia, which provided the substantive law, had abolished the tort of alienation of affections.[46] The court reasoned that, "[t]he fact that a tort may have overtones of affection alienation does not bar recovery on the separate and distinct accompanying wrongdoing [of emotional distress]," and that "[t]he unwarranted breach in the physical relationship and its resulting adverse impact on the father would have entitled [him] to some damages, even if the affection of his son for him remained unabated."[47] In response to the argument that this approach may cause an "avalanche of cases," the court noted the limiting effect of the proof required to sustain the action for intentional infliction of emotional distress, stating that "much more than simply aggravation must be shown."[48] The court also found that the need to provide a remedy and to deter the harm caused by the deliberate frus-

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42. Id.

43. *Ruffalo*, 590 F. Supp at 711.

44. Vermont's custody statute, unlike Louisiana's, neither requires nor expressly prohibits joint custody. The statute requires the court to make a determination of what is in the "best interest" of the child, in light of, but not limited to the following factors:

1) The wishes of the parents as to the custody of the child;

2) the interaction and interrelationship of the child with the child's parent or parents, siblings, and any other person who may significantly affect the child's best interest;

3) the child's adjustment to home, school, and community;

4) the mental and physical health of all individuals involved.

Vt. Stat. Ann. tit. 15, § 652 (1984). Also, neither parent enjoys a presumption of a right to custody in his or her favor due to the sex of the parent or of the child. Vt. Stat. Ann. tit. 15, § 652 (1984).

While the Vermont statutory scheme does not favor joint custody as does Louisiana's, it still reflects a policy that contact with both parents is in the best interest of the child. In light of Louisiana's even stronger policy favoring continuous contact of children with both of their parents, Louisiana courts may be even more justified in allowing a cause of action for intentional interference with visitation.

45. Raftery v. Scott, 756 F.2d 335 (4th Cir. 1985).

46. Id. at 339.

47. Id.

48. Id. at 340.

tration of a close relationship between parent and child was superior to the danger of frivolous litigation.[49]

The court in *Ruffalo v. United States*[50] stated assertively that a cause of action in tort should be allowed for the intentional interference with the "visitation and communication rights" of a noncustodial parent. In this case, liability was imposed upon the United States Government.[51] The court criticized *McGrady v. Rosenbaum*[52] (relied on in *Owens*), wherein a New York court rejected a damage claim for interference with visitation rights, and went so far as to predict that *McGrady* "is not likely to be followed by courts that are adequately sensitive to the significance of 'frequent and continuing contact with both parents after the parents have separated or dissolved the marriage.'"[53] The court in *Ruffalo* thus relied on the same policy considerations that underlie the new Louisiana Civil Code provisions. The court further pointed out that family law specialists have viewed the potential of damage suits to be "a useful deterrent to lawless conduct."[54] As noted above, *Owens* provides the perfect example of how useful such a deterrent may be, in light of the fruitless efforts of Mr. Owens in pursuing his "alternative remedies" to gain access to his child.

Patricia M. Hoff, Director of the Child Custody Project at the National Legal Resource Center for Child Advocacy and Protection, strongly advocates the availability of a tort remedy in "child snatching" cases. Under her analysis, such cases include both denial of visitation and deprivation of custody.[55] Not only would the victim-parent be compensated for his or her injuries, but "suits of this kind may have the

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49. Id.

50. 590 F. Supp. 706 (W.D. Mo. 1984).

51. Id. Plaintiff Donna Ruffalo's former husband was taken into the Witness Protection Program by the United States Government. At the father's request, their son was included in the program. Although the son had previously been under the custody of the plaintiff, he was in the "possession" of his father pursuant to a state court order at the time he was brought within the protection of the federal program. Under the court order, plaintiff had reasonable visitation privileges and weekend possession for one day. As a result of her son's being taken into the program, Mrs. Ruffalo did not see or hear from him for almost four years. The court found that Mrs. Ruffalo had lost "visitation and communication" rights and concluded that she would have been awarded damages against a private individual under Missouri law. Consequently, federal liability attached under the Federal Tort Claims Act. The court permitted this award over the objections of the Federal Government that the child's safety and security had been at stake, and that it was acting in good faith.

52. 62 Misc. 2d 182, 308 N.Y.S.2d 181 (1970).

53. *Ruffalo*, 590 F. Supp. at 711.

54. Id.

55. P. Hoff, J. Schulman and A. Volenik, Interstate Child Custody Disputes and Parental Kidnapping: Policy, Practice and Law, Ch. 14, at 5 (1982) [hereinafter cited as Hoff].

beneficial side effect of compelling disclosure of the child's location."[56] Third-party defendants sued for conspiracy would be "apt to disclose the child's whereabouts rather than become entangled in a potentially expensive lawsuit."[57] Hoff suggests that punitive damages be assessed for continuing violations, in order to increase the incentive to restore the child to the lawful custodian. Hoff also criticizes decisions such as *McGrady* as being: "pre-UCCJA [Uniform Child Custody Jurisdiction Act] case[s] [which reflect] a judicial conservatism which did not adequately address the problems inherent in interstate custody kidnapping . . . [and] concealment."[58] It is important to recognize that the act of concealment occurs in both custody and visitation violations. For example, in *Owens*, the mother moved the child to Texas and effectively concealed her whereabouts from the father, causing him considerable distress and expense.[59]

A final argument for making available a cause of action in tort in Louisiana for interference with visitation rights is that such a cause of action is not inconsistent with Louisiana tort law. This is especially clear when Louisiana law is examined with reference to the court's analysis in *Ruffalo*. In *Ruffalo*, the court found that, while Missouri had not yet allowed claims for loss of society of a parent or child in personal injury cases (as opposed to death cases), recovery was not precluded.[60] In Louisiana, by contrast, damages for loss of society, support and companionship as a result of an offense or quasi-offense which results in death as well as personal injury, are available.[61] Furthermore, Louisiana courts have permitted recovery of damages for mental pain and suffering caused by an offense or quasi-offense committed against the plaintiff and unaccompanied by physical injury.[62] In addition, Louisiana, like Missouri,[63] makes no distinction between custodial and noncustodial parents when considering a cause of action for these damages.[64] It would seem, then, that recovery should be as available for damages caused by direct interference with association and companionship as for damages caused indirectly by an accident.[65] Allowing recovery to a noncustodial

56. Hoff, supra note 55, Ch. 13, at 9.

57. Id., Ch. 14, at 1.

58. Id., Ch. 14, at 15.

59. Information received by the author from Mr. Owens' attorney during the course of a telephone interview, October 1985.

60. 590 F. Supp. at 712.

61. La. Civ. Code art. 2315 (A) & (B).

62. Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145 (La. App. 1st Cir. 1961); Spencer v. Terebelo, 373 So. 2d 200 (La. App. 4th Cir. 1979).

63. *Ruffalo*, 590 F. Supp. at 712.

64. La. Civ. Code art. 2315 (B); Daniels v. Conn, 382 So. 2d 945 (La. 1980); Cathey v. Bernard, 467 So. 2d 9 (La. App. 1st Cir. 1985).

65. 590 F. Supp. at 712.

parent for mental distress due to a loss of society and companionship as a result of intentional interference with visitation rights should not be inconsistent with Louisiana law.

Reasons for Denying a Civil Cause of Action for Intentional Interference With Visitation

Although a civil cause of action for damages resulting from interference with visitation has been allowed in some states, strong arguments exist (apart from those relied on in *Owens*) for denying this type of recovery. The creation of a new civil liability must be carefully considered, with a view toward all potential repercussions.

While Louisiana courts have expressed the policy of protecting Louisiana citizens from the wrongful acts of others,[66] in family law cases this broad policy must be considered together with the more narrow, and now paramount, policy of serving the best interests of the child. A dissenting opinion in an Iowa Supreme Court decision, *Wood v. Wood*,[67] argues that the child may be injured, rather than benefitted, by allowing monetary damages for interference with custody.[68] In that dissent, Justice Wolle asserts that it is in the best interest of the child that parental bitterness and resentment be kept in check, an interest which may be thwarted by the creation of a civil suit for damages which might add yet another "weapon for the arsenal of litigants engaging in marital or post-marital warfare."[69] Wolle also points to the problem of burdening already strained court dockets. Not only might the suit for interference with custody invite a counter-claim for violation of visitation rights, but there is the possibility that children as well as parents may eventually be allowed to sue. Might grandparents also sue for denial of visitation rights?[70] Where do we draw the line? Could a parent sue for a single instance of denial of visitation or only after several blatant violations?

An additional argument against allowing damages for the denial of visitation is that the damage award comes either directly or indirectly out of funds used to support the child.[71] Also, the noncustodial parent could merely be seeking a means of recovering past alimony or child support payments. There is no guarantee that he is genuinely concerned

66. Jagers v. Royal Indem. Co., 276 So. 2d 309 (La. 1973)(state has policy of protecting its citizens from damage caused by the wrongful acts of others).

67. 338 N.W.2d 123 (Iowa 1983).

68. Id. at 127-30 (Wolle, J., dissenting).

69. Id. at 127 (Wolle, J., dissenting).

70. Id. at 128 (Wolle, J., dissenting).

71. But see *Ruffalo*, where the defendant who was required to pay damages was the United States Government, rather than the custodial parent.

with maintaining contact with the child. The child may therefore be deprived of financial as well as moral support during the course of the litigation. Since the potential for abuse exists, a system of checks would have to be implemented to control the availability of this kind of relief. Limitation on damages, and an exhaustion of remedies requirement are examples of such safeguards.

Finally, it should be noted that one court has found that the tort of intentional infliction of mental distress is inapplicable to the deprivation of visitation rights. The New York court in *McGrady* refused to allow the father to collect damages for the mother's alleged denial of his visitation rights.[72] The Louisiana court of appeal in *Owens* explicitly followed *McGrady* in denying recovery. Both the *McGrady* and *Owens* courts failed to give compelling reasons for their decisions, stating merely that a cause of action for damages was not among the current remedies available to parents in these situations. When confronted with the argument that New York now allows recovery for intentional infliction of mental distress absent proof of the breach of any duty other than the duty not to inflict, the court stated:

> [S]trong policy considerations militate against judicially applying these recent developments in this area of the law to the factual context of a dispute arising out of matrimonial differences. To sustain the claim for damages, would result in a revival of evils not unlike those which prompted the Legislature . . . to outlaw actions for alienation of affections and criminal conversation.[73]

The "evils" mentioned in *McGrady* were found to be inconsequential in *Raftery v. Scott*,[74] in which the court allowed a cause of action for intentional infliction of emotional distress resulting from a denial of visitation. It was in this case that the court reasoned that, although Virginia had abolished the tort of alienation of affections, the cause of action for denial of visitation was distinguishable and should be allowed.

The adverse consequences of allowing a civil suit for damages for interference with custody or visitation, such as increased animosity, burdening of the dockets and, most importantly, the deprivation of funds for the child, are real; nevertheless, a system may be developed to minimize these adverse effects while maximizing the possibility of achieving the ultimate goal of reducing violations of custody and visitation decrees.

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72. 62 Misc. 2d 182, 308 N.Y.S.2d 181 (1970).
73. Id. at 190-91, 308 N.Y.S.2d at 189-90.
74. 756 F.2d 335, 339 (4th Cir. 1985).

Other Alternatives

That Mr. Owens was forced to resort to a civil suit to gain access to his child suggests a deficiency in Louisiana's current visitation enforcement mechanisms. The remedies presently available in Louisiana include the institution of proceedings to enforce the decree,[75] to have the custodial parent placed in contempt,[76] and to obtain sole or joint custody.[77] Failure to obey court ordered visitation can result in a fine of up to five hundred dollars, imprisonment of up to three months, or both.[78] Finally, since *Owens* was decided, the Louisiana Legislature has added yet another remedy: the posting of bond or security to insure compliance with a child visitation order.[79] Louisiana does not allow the withholding of alimony or child support in order to elicit compliance with visitation rights.[80]

When evaluating the adequacy of these remedies, the willingness of the Louisiana courts to enforce them consistently is a necessary consideration. In addition, the following question must be asked: what is the main purpose behind these remedies? Compensation to the aggrieved parent? Compensation to the child? Punishment for disobeying a custody decree? Enforcing the rights established in the custody decree? Since the best interest of the child has been characterized as requiring the greatest possible contact with both parents, enforcement must be the main goal.

Contempt

With respect to the effectiveness of the contempt remedy, *Owens* readily indicates that it will not always deter future violations: once the mother was released, the violations continued.[81] Additionally, depriving the child of its primary caretaker through jailing and/or deprivation of financial support may do more harm than good. The unwillingness exhibited by courts to imprison a parent for violation of a visitation order[82] is further evidence of the ineffectiveness of this remedy. Finally,

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75. See La. R.S. 9:305 (Supp. 1986).
76. La. R.S. 13:4611 (Supp. 1986).
77. Id.
78. Id.
79. La. R.S. 9:312 (1985).
80. Simon v. Simon, 450 So. 2d 755 (La. App. 5th Cir. 1984)(failure to comply with visitation order does not relieve father of support obligation). Several states allow termination of alimony and/or child support for denial of visitation rights, see, e.g., Szamocki v. Szamocki, 47 Cal. App. 3d 812, 121 Cal. Rptr. 231 (1975); Hudson v. Hudson, 97 Misc. 2d 558, 412 N.Y.S.2d 242 (Sup. Ct. 1978); Smith v. Smith, 282 Minn. 190, 163 N.W.2d 852 (1968).
81. 471 So. 2d at 921.
82. Note, Making Parents Behave, 84 Colum. L. Rev. 1059, 1083 (1984).

it should be noted that, while contempt proceedings may be useful while the violation is within the state, they afford no relief where the abductor has left the state.[83]

Change of Custody

The threat of a change of custody could prove to be the most powerful deterrent to denying visitation rights, if the custodial parent genuinely cares for his or her child and is not denying visitation solely for the purpose of harming the noncustodial parent. Nevertheless, any deterrent is self-defeating if it opposes rather than serves the interests of the child.[84] For this reason, the courts may find that a denial of visitation does not merit as extreme a remedy as a change in custody.

The Louisiana Supreme Court, in *Everett v. Everett*,[85] held that interference with visitation does not merit a change in custody, absent proof that the custodial parent's behavior has had a detrimental effect on the child. Subsequently, however, Civil Code article 146 was amended[86] to establish the rebuttable presumption that joint custody is in the best interest of the child, even if the parents have agreed that one of them could have sole custody. This legislative change may therefore support an argument that the deprivation of visitation has the "detrimental effect" that *Everett* requires. Nevertheless, the presumption will not support a change from the sole custody of one parent to the sole custody of the other. Additionally, as illustrated in *Dominick v. Dominick*,[87] the court may find that due to the very fact that the parents have been unable to agree on many matters, joint custody would also be inappropriate.

In *Turner v. Turner*,[88] the Louisiana Supreme Court explained that the presumption in favor of joint custody does not require the granting of joint custody, as it may be rebutted "upon a proper showing that a different arrangement is in the child's best interest."[89] Because the parents in *Turner* were unable to agree upon physical custody, as well as upon how the children were to be brought up, the court found that joint custody was not in the best interest of the children.[90] The court in *Dominick* relied on *Turner* to reach its result. The implication from these cases is that, in similar cases involving petitions for a change in

83. Wood v. Wood, 338 N.W.2d 123, 127 (Iowa 1983)(noting that no extradition procedures are available in contempt proceedings).

84. La. Civ. Code art. 146.

85. 433 So. 2d 705 (La. 1983).

86. 1983 La. Acts No. 695.

87. 470 So. 2d 314 (La. App. 5th Cir. 1985).

88. 455 So. 2d 1374 (La. 1984).

89. Id. at 1379.

90. Id. at 1381.

custody due to interference with visitation, courts may prefer to maintain the status quo and leave sole custody in the present legal custodian.

The availability of a petition for a change of custody, therefore, may not always provide an adequate remedy. Even if such a change is awarded, there is no guarantee that a reversal of roles would not occur with regard to denial of visitation. Finally, it should be recognized that the noncustodial parent may be unable or unfit to have sole or joint custody; i.e., the reasons supporting the original custody decree may not change simply because the custodial parent denies visitation. Nevertheless, the noncustodial parent's inability to have custody of his or her children does not render invalid his or her right and desire to visit with them.

In cases where a noncustodial parent is unable to petition for joint or sole custody, but he or she has demonstrated a sincere desire to visit with his or her child, the civil cause of action in tort could prove to be a desirable alternative. Possible safeguards against abusing this remedy would be to require the party suing to prove that he or she has made a diligent effort to see the child, and that a type of "exhaustion of remedies" requirement be met. For example, after having tried to communicate or see the child, the noncustodial parent should have to pursue existing remedies of contempt, a petition for enforcement of visitation under Louisiana Revised Statutes 13:4611, and/or the posting of bond. Perhaps, in certain cases, the noncustodial parent should have to make a showing of why he or she is unwilling or unable to petition for joint custody. Additionally, the judge may be given the discretion to require that the couple attempt to reach an agreement through mediation before allowing the suit to proceed.

Bond

Requiring the custodial parent to post bond represents yet another financial incentive with which to insure compliance with custody decrees. Unlike with the proposed remedy of a civil suit for damages, there is not the possibility of using this remedy to injure the other parent. Requiring bond also enjoys the advantage of addressing the potential controversy before the fact, rather than rectifying a past violation. Nevertheless, unlike the civil suit for damages, requiring bond does not compensate the aggrieved parent. Further, in cases such as *Owens*, where the custodial parent was continuously cited for contempt for failure to allow visitation, the posting of bond would not likely prove to be effective.

Withholding of Support Payments

New York, along with several other jurisdictions, allows the noncustodial parent to withhold support payments in order to enforce vis-

itation rights.[91] This remedy has been severely criticized as being ineffective in most cases, as well as posing a financial and emotional threat to the child.[92] Additionally, the possibility of creating a vicious cycle exists when support is withheld because of denial of visitation, and visitation is denied because of withholding of support.

Mediation

Mediation, provided for in Civil Code article 146(I), can be used to establish the initial custody and visitation agreement between the spouses, as well as to resolve later conflicts which may arise. The mediation process is most effective when there is present an experienced and qualified mediator who "appreciates the psychological impact of the divorce,"[93] and who is willing to help the couple "define, narrow, clarify, organize, and summarize issues."[94] Louisiana Revised Statutes 9:352 states the purpose of a mediation proceeding to be: "to reduce the acrimony which may exist between the parties and to develop an agreement assuring the child or children's close continuing contact with both parents after the marriage is dissolved. The mediator shall use his or her best efforts to effect a settlement of the custody or visitation dispute."[95]

Although mediation cannot erase the damage already suffered in cases such as *Owens*, future violations may be avoided by requiring this procedure. When an individual participates in the decision-making process by drawing up his or her own agreement, it is more likely that the terms of the agreement will be obeyed. Studies indicate that individuals who reach an agreement through mediation are less likely to violate their agreements and "engage in relitigation."[96] Additionally, many Louisiana judges have expressed dissatisfaction with the adversary solution to child custody decisions. They have been quoted as saying that they "'dread' handling family law cases," and often do not feel qualified to decide what is in the best interest of the child.[97]

Conclusion

Visitation has been characterized as a "species of custody."[98] For this and other reasons outlined above, it seems inequitable and incon-

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91. See supra note 80.
92. Note, supra note 82.
93. Comment, The Best Interest of the Divorcing Family—Mediation Not Litigation, 29 Loy. L. Rev. 55, 70 (1983).
94. Id.
95. La. R.S. 9:352 (1985).
96. Note, supra note 82, at 1087.
97. Comment, supra note 93, at 67.
98. 434 So. 2d at 377.

sistent for Louisiana to allow a cause of action for interference with custody while rejecting the same for interference with visitation rights. The noncustodial parent has rights as equally deserving of protection as the custodial parent. Furthermore, the custodial parent has a tremendous power over the noncustodial parent to thwart his attempts to exercise his visitation rights.

It is considered to be in the best interest of the child to have "continued contact with noncustodial parents."[99] Consequently, allowing the custodial parent vindictively to frustrate visitation would harm both the noncustodial parent and the child, thus undermining the basic policies of our law. It is possible that permitting the tort cause of action, in addition to the alternative remedies already available, would help to discourage continuing conflicts over child custody and visitation, and encourage compliance with provisions in separation and divorce decrees. The focus, however, should be on avoiding initial controversy and insuring immediate compliance with the custody decree. This is especially important since children of divorced families have more complex and difficult developmental needs than the children of intact families.[100]

The use of mediation proceedings has been suggested as the most positive means for avoiding all post-divorce disputes.[101] Nevertheless, where mediation and other available remedies prove ineffective, the civil cause of action should be considered. The child needs the most stable, pleasant atmosphere possible after divorce and should have happy, continuous contact with both parents without feeling guilty or uneasy. For these reasons, the tort remedy should be allowed, but only after a careful screening process has been conducted. Such law suits might serve to deter undesirable conduct as well as to compensate the aggrieved parties. Once the parties have met the requirements to undertake such a lawsuit, additional safeguards within the legal system are present to insure that a fair result is reached. A fixed or flexible ceiling could be placed on the amount of damages recoverable, or the trial could be conducted without a jury in order to avoid the possibility of unduly burdensome damages. Also, the court could be required to ensure that the judgment would cause no financial harm to the child, or that the money recovered be paid into a trust fund in favor of the child.

Louisiana should seriously consider the possible advantages of allowing a civil cause of action for interference with visitation. As mentioned, this cause of action should be allowed only after the parties have exhausted other remedies. This will help to ensure the effectiveness of the remedy while avoiding additional hardships on all of the parties involved.

Eve Kahao Gonzalez

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99. Id.
100. Note, supra note 82, at 1080.
101. Comment, supra note 93.